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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte DAVID W. HURD, TASSANEE K. SUPAKKUL, MATHEWS
THOMAS, and JULIO WONG

Appeal 2016-003646
Application 13/441,988
Technology Center 2400

Before JOHNNY A. KUMAR, JUSTIN BUSCH, and CATHERINE
SHIANG, *Administrative Patent Judges*.

SHIANG, *Administrative Patent Judge*.

DECISION ON APPEAL

Appellants appeal under 35 U.S.C. § 134(a) from the Examiner's rejection of claims 1–20, which are all the claims pending and rejected in the application. We have jurisdiction under 35 U.S.C. § 6(b). We affirm-in-part.

STATEMENT OF THE CASE

Introduction

According to the Specification, the present invention relates to digital content delivery. *See generally* Spec. 1. Claim 1 is exemplary:

1. A method for controlling immediate content presentation comprising:

selecting a channel programming associated with a channel, wherein the channel is associated with a programming broadcasting system;

displaying the channel programming upon a presentation device;

receiving an immediate content from a content delivery entity interrupting the presentation of the channel programming;

automatically determining presentation preferences for the immediate content with the channel programming, wherein at least one of the presentation preferences is a time of presentation; and

simultaneously presenting the channel programming and the immediate content on the presentation device.

References and Rejections

Claims 1–5, 7–10, 12–16, and 18–20 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Allen (US 2004/0078814 A1; Apr. 22, 2004) and Howarter (US 2010/0211972 A1; Aug. 19, 2010).

Claims 6 and 11 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Allen, Howarter, and Amsterdam (US 2011/0285542 A1; Nov. 24, 2011).

Claim 17 is rejected under 35 U.S.C. § 103(a) as being unpatentable over Allen, Howarter, and Kendall (US 2005/0273809 A1; Dec. 8, 2005).

ANALYSIS

We disagree with Appellants' arguments, and agree with and adopt the Examiner's findings and conclusions in (i) the action from which this

appeal is taken and (ii) the Answer (regarding claims 1 and 3–9) to the extent they are consistent with our analysis below.¹

On this record, the Examiner did not err in rejecting claim 1.

Appellants contend Allen and Howarter do not collectively teach “automatically determining presentation preferences for the immediate content with the channel programming, wherein at least one of the presentation preferences is *a time of presentation*; and simultaneously presenting the channel programming and the immediate content on the presentation device,” as recited in claim 1 (emphasis added). *See* App. Br. 10–21; Reply Br. 1–5. In particular, Appellants assert “the specification’s preference for ‘a time of presentation’ indicates a time that a presentation begins on a playback device.” App. Br. 14. With respect to Howarter’s paragraphs 36 and 37, Appellants contend:

The fact that user preferences are acknowledged – yet none of these preferences indicate that an alert is to be *time-shifted* (which is a non-conventional activity for an alert - not known to exist in prior art) is an indication that no such feature is contemplated – therefore paragraphs 0036 and 0037 seem to teach away from the claimed limitation.

App. Br. 19–20 (emphasis added); *see also* Reply Br. 3, 5.

Appellants have not persuaded us of error.

First, it is well established that during examination, claims are given their broadest reasonable interpretation consistent with the specification and should be read in light of the specification as it would be interpreted by one of ordinary skill in the art, *but without importing limitations from the*

¹ To the extent Appellants advance new arguments in the Reply Brief without showing good cause, Appellants have waived such arguments. *See* 37 C.F.R. § 41.41(b)(2).

specification. See *In re Am. Acad. of Sci. Tech Ctr.*, 367 F.3d 1359, 1364 (Fed. Cir. 2004) (citations omitted); *SuperGuide Corp. v. DirecTV Enters., Inc.*, 358 F.3d 870, 875 (Fed. Cir. 2004). Appellants do not contend the Specification defines the term “a time of presentation,” and we decline to import exemplary limitations from the Specification into the term.

As a result, Appellants’ arguments are not commensurate with the scope of the claim, as Appellants have not shown “a time of presentation” requires “a presentation begins on a playback device” (App. Br. 14) or “time-shifted” presentation (App. Br. 19).

Further, the Examiner reasonably interprets the claimed “time of presentation” to encompass Howarter’s disclosure of presenting *immediately* or “not at any time.” See Ans. 9–10; Howarter ¶¶ 36–37 (“If the retrieved user preferences indicate that a user does not prefer to interrupt the current displayed programming with a broadcast emergency alert system message, the process terminates. . . . if the retrieved user preferences indicate that a user wants to interrupt a current displayed programming with a broadcast emergency alert system message, the process may execute one or more actions based on the retrieved user preferences.”). Appellants’ argument that “it would be a stretch of the imagination to claim that the choice to not display an emergency alert at all is synonymous with a *particular* time of presentation” (Reply Br. 5) is not commensurate with the scope of the claim, as Appellants have not shown the claim requires a “particular” time of presentation. In any event, Appellants do not contend the Examiner’s mapping “time of presentation” to Howarter’s disclosure of presenting *immediately* is incorrect.

Second, Appellants’ teaching away argument is unpersuasive because Appellants fail to provide adequate analysis under the case law. Appellants fail to assert—let alone show—one skilled in the art “would be discouraged from following the path set out in the reference, or would be led in a direction divergent from the path that was taken by the applicant.” *In re Kahn*, 441 F.3d 977, 990 (Fed. Cir. 2006).

Because Appellants have not persuaded us the Examiner erred, we sustain the Examiner’s rejection of claim 1.

We also sustain the Examiner’s rejection of corresponding dependent claims 3–5, 7, and 9, which Appellants do not separately argue with substantive contentions.

Separately Argued Claims

Regarding dependent claim 2, Appellants argue Allen and Howarter do not collectively teach “wherein the automatic determination is performed based on heuristics,” because Allen does not teach heuristics, and Howarter’s paragraph 19 does not teach the disputed claim limitation. *See* App. Br. 24.

As discussed above, it is well established that during examination, claims are given their broadest reasonable interpretation consistent with the specification and should be read in light of the specification as it would be interpreted by one of ordinary skill in the art, but without importing limitations from the specification. *See Am. Acad. of Sci. Tech Ctr.*, 367 F.3d at 1364; *SuperGuide Corp.*, 358 F.3d at 875. Further, the meaning of a claim term “is the meaning that the term would have to a person of ordinary

skill in the art in question *at the time of the invention, i.e., as of the effective filing date of the patent application.*” *Phillips v. AWH Corp.*, 415 F.3d 1303, 1313 (Fed. Cir. 2005) (citations omitted) (en banc) (emphasis added).

We agree with Appellants that the Examiner erred. In this case, the Specification discusses “heuristically” in paragraphs 36 and 47, but does not specifically define the term “heuristics.” Consistent with Appellants’ interpretation about the term, a relevant technical dictionary defines “heuristic” as “[a]n approach or algorithm that leads to a correct solution of a programming task by nonrigorous or self-learning means. One approach to programming is first to develop a heuristic and then to improve on it. The term comes from Greek *heuriskein* (“to discover, find out”) and is related to “eureka” (“I have found it”).” Microsoft Computer Dictionary 251 (5th ed. 2002). That definition of “heuristics” is consistent with the Specification’s description of the term. *See* Spec. [0036], [0047] (discussing “settings 328 can be heuristically determined” and “marketing analysis can be leveraged to heuristically determine how news data 424 will be conveyed to a viewer”).

The above definition is more persuasive evidence than the *undated non-technical* dictionary page cited by the Examiner (Ans. 10), which does not show how *one skilled in the art* would understand the term *at the time of the invention*. Further, we have reviewed the Howarter (Figure 5, paragraphs 19 and 36) and Allen (Figure 6) portions cited by the Examiner, and consistent with the interpretation discussed above, one skilled in the art would understand the cited portions do not discuss “heuristics.” Absent further explanation from the Examiner, we do not see how the cited prior art

portions teach “wherein the automatic determination is performed based on heuristics,” as required by claim 2.

Because the Examiner fails to provide sufficient evidence or explanation to support the rejection, we are constrained by the record to reverse the Examiner’s rejection of claim 2.

Claims 10–20 similarly recite “heuristics.” *See* claims 10–20. Therefore, for similar reasons, we reverse the Examiner’s rejection of claims 10–20.

Regarding dependent claim 6, Appellants argue Amsterdam does not teach “wherein at least one of the video and the audio of the immediate content is presented on a different presentation device proximately located to the presentation device,” because Amsterdam does not teach the claimed “immediate content.” *See* App. Br. 25.

Because the Examiner relies on the combination of Allen, Howarter and Amsterdam to teach claim 6, Appellants cannot establish nonobviousness by attacking Amsterdam individually. *See In re Merck & Co., Inc.*, 800 F.2d 1091, 1097 (Fed. Cir. 1986). The Examiner finds—and Appellants do not dispute—Allen teaches the claimed “immediate content.” *See* Final Act. 5. Therefore, Amsterdam does not need to teach that claim element separately.

Because Appellants have not persuaded us the Examiner erred, we sustain the Examiner’s rejection of claim 6.

Regarding dependent claim 8, Appellants argue Allen and Howarter do not collectively teach “wherein the immediate content is received within

a sub-channel of the channel,” because Allen does not teach a sub-channel of the channel, and Howarter’s paragraphs 19, 28, and 30 do not teach the disputed claim limitation. *See* App. Br. 25–26.

In response to Appellants’ arguments, the Examiner finds Allen and Howarter collectively teach the disputed claim limitation, including the recited sub-channel, because Howarter teaches “the assignment of the channel frequency encoded with the EAS message.” Ans. 11. Appellants fail to critique the additional Howarter portions cited by the Examiner in the response, and fail to persuasively respond to the Examiner’s further findings. Therefore, Appellants fail to show error in the Examiner’s findings. *See Baxter Travenol Labs.*, 952 F.2d at 391.

Because Appellants have not persuaded us the Examiner erred, we sustain the Examiner’s rejection of claim 8.

DECISION

We affirm the Examiner’s decision rejecting claims 1 and 3–9.

We reverse the Examiner’s decision rejecting claims 2 and 10–20.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED-IN-PART